Supreme Court, U.S.
FILED
JAN 16 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-701 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1989

TUOLUMNE PARK AND RECREATION DISTRICT, ET AL., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

ROBERT S. BURK
General Counsel

ELLEN D. HANSON
Associate General Counsel

EVELYN G. KITAY
Attorney
Interstate Commerce Commission
Washington, D.C. 20423

QUESTIONS PRESENTED

1. Whether the court of appeals had jurisdiction to review a decision of the Interstate Commerce Commission (ICC or Commission) that became final in February 1985, when the petition for review was not filed within the 60-day time limit set forth in 28 U.S.C. 2344 for review of ICC decisions.

2. Whether the court below properly applied *ICC* v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987), in concluding that it lacked jurisdiction to review the ICC's later decisions, in July 1987, not to reopen its February 1985 proceeding.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	7
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Advance Transp. Co. v. *United States*, 884 F.2d 303 (7th Cir. 1989) 9

Allison v. *Block*, 723 F.2d 631 (8th Cir. 1983)... 10

Bank of Commerce v. *Board of Governors*, 513 F.2d 164 (10th Cir. 1975) 11

Bennett v. *Director, Office of Workers' Compensation Programs*, 717 F.2d 1167 (7th Cir. 1983) 10

Callaway v. *Block*, 763 F.2d 1283 (8th Cir. 1985) 9

Chicago & N.W. Transp. Co. v. *Kalo Brick & Tile Co.*, 450 U.S. 311 (1981) 1-2

Colorado v. *United States*, 271 U.S. 153 (1926) 2

Connecticut Trust for Historic Preservation v. *ICC*, 841 F.2d 479 (2d Cir. 1988) 3

Exemption of Out-of-Service Rail Lines, 2 I.C.C.2d 146 (1986), aff'd *sub nom. Illinois Commerce Commission* v. *ICC*, 848 F.2d 1246 (D.C. Cir.), cert. denied, 109 S. Ct. 783 (1988) 3

Federal Crop Insurance Corp. v. *Merrill*, 332 U.S. 380 (1947) 10

Hayfield Northern R.R. v. *Chicago & N.W. Transp. Co.*, 467 U.S. 622 (1984) 6

Cases—Continued: Page

ICC v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987) 6, 7, 8
Lyng v. *Payne*, 476 U.S. 926 (1986) 9-10
Matzke v. *Block*, 732 F.2d 799 (10th Cir. 1984) 10
North Alabama Express, Inc. v. *United States*, 585 F.2d 783 (5th Cir. 1978) 10-11
Pearson v. *Walling*, 138 F.2d 655 (8th Cir. 1943), cert. denied, 321 U.S. 775 (1943) 11

Constitution, statutes and regulations:

U.S. Const. Amend. V (Due Process Clause) ... 9, 10
Hobbs Act:
28 U.S.C. 2341 *et seq.* 7
28 U.S.C. 2344 7
National Environmental Policy Act of 1969, 42 U.S.C. 4321-4343 (1982 & Supp. V 1987) 3
National Historic Preservation Act, 16 U.S.C. 470f 3
7 U.S.C. 1981a 10
44 U.S.C. 1507 10
49 U.S.C. 10101a 2
49 U.S.C. 10327(g) 8
49 U.S.C. 10505 2
49 U.S.C. 10505(a) 2
49 U.S.C. 10505(d) 4, 6
49 U.S.C. 10903 3
49 U.S.C. 10903(a) 3
49 U.S.C. 10904(e)(3) 2
49 C.F.R.:
Pt. 1105 3
Section 1105.6 3

Regulations – Continued: Page

Section 1105.7(a) 3
Section 1105.11 3
Pt. 1152:
Section 1152.50 4
Section 1152.50(d) 4

Miscellaneous:

50 Fed. Reg. 188 (1985) 4, 9
H.R. Conf. Rep. No. 1430, 96th Cong., 2d Sess. (1980) 2

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-701

TUOLUMNE PARK AND RECREATION DISTRICT, ET AL., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 881 F.2d 663. The decisions of the Interstate Commerce Commission (Pet. App. 13a-50a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 31, 1989. The petition for a writ of certiorari was filed on October 30, 1989 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The ICC has exclusive and plenary authority over rail line abandonments. *Chicago & N.W. Transp. Co.* v. *Kalo*

Brick & Tile Co., 450 U.S. 311, 319 (1981). Ordinarily, to be relieved of its common carrier obligation to provide service on a line, a rail carrier must apply to the ICC for a certificate of abandonment under 49 U.S.C. 10903. The ICC then must determine whether "the present or future public convenience and necessity require or permit the abandonment." 49 U.S.C. 10903(a). In making that determination, the Commission balances the needs of shippers and communities for the line against the burden that the line imposes on the carrier and interstate commerce. See *Colorado v. United States*, 271 U.S. 153, 168 (1926). The Commission's governing statutes contain instructions for the filing and processing of abandonment applications. See, *e.g.*, 49 U.S.C. 10904(e)(3).

Since 1980, the ICC has had the authority to exempt a service from regulation when it finds that: (1) regulation is not necessary to carry out Congress's rail-transportation policy set out in 49 U.S.C. 10101a, and (2) either the transaction is of limited scope, or regulation is not needed to protect shippers from the abuse of market power. See 49 U.S.C. 10505(a).[1] The Commission has used this exemption power to allow certain carriers to abandon their lines without following the regular abandonment procedures

---

[1] Section 10505 was enacted because Congress believed that, although it had been able to "indentify broad areas of Commerce where reduced regulation is clearly warranted, the Commission is more capable through the administrative process of examining specific regulatory provisions and practices not yet addressed by Congress to determine where they can be deregulated consistent with the policies of Congress." H.R. Conf. Rep. No. 1430, 96th Cong., 2d Sess. 105 (1980). Congress expected that "as many as possible of the Commission's restrictions on changes in prices and services by rail carriers will be removed through the use of Section 10505, and that the Commission will adopt a policy of reviewing carrier actions after the fact to correct abuses of market power." *Ibid.*

under 49 U.S.C. 10903. See *Exemption of Out-of-Service Rail Lines*, 2 I.C.C.2d 146 (1986) (*Out-of-Service*), aff'd *sub nom. Illinois Commerce Commission* v. *ICC*, 848 F.2d 1246 (D.C. Cir.), cert. denied, 109 S. Ct. 783 (1988).

In authorizing a rail abandonment, the ICC must consider the environmental consequences of its action under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321-4343 (1982 & Supp. V 1987). Under the National Historic Preservation Act (NHPA), 16 U.S.C. 470f, the Commission also must "take into account" the effect of its decision on historic properties.[2] As the Commission recognized in the instant case, NEPA and NHPA apply to an abandonment action whether it is taken under Section 10903 (full abandonment proceedings) or under Section 10505 (exemption proceedings). See *Illinois Commerce Commission* v. *ICC*, 848 F.2d at 1257-1260;[3] *Connecticut Trust for Historic Preservation* v. *ICC*, 841 F.2d 479, 483-484 (2d Cir. 1988).

2. The abandonment in this case was authorized under the ICC's *Out-of-Service* class exemption, which allows the abandonment of lines that have not generated any traffic for at least two years and are not a necessary link to other

---

[2] The ICC's rules implementing NEPA and NHPA are codified at 49 C.F.R. Pt. 1105. Rule 1105.7(a) requires persons initiating abandonment proceedings to furnish a detailed environmental report discussing such issues as alternatives to the proposed action and effects on land use, wetlands, air, energy, wildlife, historic sites and structures, and the coastal zone. Under Rule 1105.11, they must serve a special environmental notice on a designated state agency that invites interested persons to address environmental issues. Under Rule 1105.6, the Commission prepares an environmental assessment in each abandonment case.

[3] In *Illinois Commerce Commission* v. *ICC*, the court upheld the Commission's out of service abandonment regulations as facially consistent with the requirements of NEPA and NHPA. See 848 F.2d at 1258-1261.

lines. 49 C.F.R. 1152.50. The procedures for abandoning such lines are designed to eliminate unnecessary regulatory requirements, while alerting the Commission to any special circumstances that would warrant disallowing or conditioning the abandonment. The carrier must provide at least 60 days' advance notice of the abandonment to affected states. The ICC also publishes a notice in the *Federal Register* at least 30 days in advance; that notice tells interested parties that they can request that the exemption authority for that line be revoked or conditioned. See 49 C.F.R. 1152.50(d); 49 U.S.C. 10505(d).[4]

In November 1984, the Sierra Railroad (Sierra) invoked the *Out-of-Service* class exemption for a one-mile segment of its rail line in Tuolumne County, California. [5] Sierra had notified the California Department of Transportation, in October 1984, of this request. Pet. App. 3a, 32a. The ICC issued a notice of the proposed abandonment (*id.* at 29a-30a), which it served on twelve California agencies, including the Governor's Office, the State Resources Agency, and the State Historic Preservation Office. *Id.* at 3a, 14a-15a & n.4; 22a-23a, 32a. The ICC also published the notice in the *Federal Register*, 50 Fed. Reg. 188 (1985). The notice advised that: (1) the exemption (*i.e.*, the line abandonment) was scheduled to become effective on February 1, 1985, (2) petitions for reconsideration or stay could be

---

[4] Under 49 U.S.C. 10505(d), the Commission may revoke an exemption, to the extent it chooses, when it finds that application of the regulatory provision involved to that person, class, or transaction "is necessary to carry out the transportation policy of section 10101a."

[5] From the late 1800s until 1980, Sierra had operated a 56.2 mile line. It received authority to abandon a 6.2 mile segment at the end of the line (between milepost 50.0 and 56.2) in 1981. The instant proceeding pertains to the segment between milepost 49 and 50. No freight had moved over this one-mile segment in the past 20 years, and passenger service had ceased in 1979.

filed, and (3) interested parties could raise not only transportation issues, but environmental, energy, and public-use concerns as well. Pet. App. 30a.

No party raised any environmental concerns and the exemption took effect in February 1985 without any further action by the ICC.[6] Sierra later contracted to sell the property to a third party, Louisiana Pacific Corporation (now Fibreboard Corporation).[7] The deed of sale was recorded on June 18, 1986. See Pet. App. 4a; 15a; 34a.

3. On June 18, 1986—the date the right-of way was sold—petitioners first formally petitioned the ICC for relief. See Pet. App. 15a-16a; 34a.[8] Petitioners argued, *inter alia*, that Sierra's abandonment authority was defective because the ICC had failed to conduct a NEPA and NHPA analysis for Sierra's line. Petitioners contended that the ICC must therefore reprocess the exemption.

In July 1987, the ICC issued a decision (*Sierra I*) denying the request to reopen. Pet. App. 31a-50a. The ICC acknowledged (*id.* at 45a-48a) that it should have considered the environmental consequences before allowing the abandonment exemption to be used for this line. It corrected its procedures for the future to assure a full and timely environmental analysis in abandonment cases brought under the exemption regulations. Because this abandonment had already been consummated and the right-of-way sold, however, the ICC concluded that it could not reopen this

---

[6] The only petition received—a utility's request for a public-use condition to secure an easement to transmit electricity—was voluntarily withdrawn.

[7] Fibreboard, a non-carrier, operates a milling operation abutting the line. It already owned the property on either side of all but about 200 feet of the one-mile right-of-way.

[8] Petitioner Friends of Sierra Railroad, Inc. first sought relief from the ICC; petitioner Tuolumne Park and Recreation District later joined the proceeding asking the ICC to reconsider its February 1985 action.

case. *Id.* at 37a-49a (citing *Hayfield Northern R.R.* v. *Chicago & N.W. Transp. Co.*, 467 U.S. 622, 623 (1984)). The Commission noted (Pet. App. 44a-45a, 49a) that petitioners (as well as the State agencies that had received notice) had slept on their rights by waiting 16 months after the exemption had become final to contest it.

Petitioners sought administrative reconsideration. In response, the ICC issued a second decision in January 1988, in which it clarified and reaffirmed *Sierra I*. It explained that, in deciding whether to revoke an exemption under 49 U.S.C. 10505(d), it would balance concerns of finality, repose, and detrimental reliance against whatever factors favor reopening. Pet. App. 19a-20a. The ICC explained that reopening was unjustified here, because all parties had actual or constructive notice of the abandonment and had slept on their rights. *Id.* at 21a-23a.

4. The court of appeals dismissed petitioners' petition for judicial review for lack of jurisdiction. Pet. App. 1a-12a. The court concluded that it could not review Sierra's original exemption authority (issued by the ICC in February 1985) because petitioners had not met the 60-day time limit in 28 U.S.C. 2344 for seeking review of ICC decisions. Pet. App. 4a-5a. With respect to the ICC's 1987 and 1988 decisions denying petitioners' reopening request, the court ruled that the petition to reopen was based on a claim of material error, not new evidence or changed circumstances. *Id.* at 5a-12a.[9] Applying the principles of *ICC* v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987), therefore, the court of appeals concluded that the "petition for review presents no issue reviewable by th[e] court." Pet. App. 12a.

The court of appeals also rejected petitioners' argument that "the notice provisions in the ICC exempt abandonment

---

[9] The court explained that petitioners' historic-preservation claims were simply "newly raised." Pet. App. 6a-7a.

procedure were inadequate, and thus [had] deprived Friends of the opportunity to present its evidence on direct appeal of the original order." Pet. App. 7a. The court upheld the *Federal Register* notice in this case as "legally sufficient notice to all interested or affected persons regardless of actual knowledge or hardship resulting from ignorance." *Id.* at 8a-9a. Noting petitioners' complaint that the *Federal Register* is not generally available in Jamestown, California, where petitioners are located, the court stated that the adequacy of notice "does not hinge on the driving distance between copies of the Federal Register and the headquarters of potentially interested parties to agency proceedings." Pet. App. 8a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Thus no further review is warranted.

1. Petitioners contend (Pet. 13-23) that the court of appeals erred in holding that it lacked jurisdiction to review the ICC's decisions in this case. That contention, however, is foreclosed by the plain terms of the Hobbs Act, 28 U.S.C. 2341 *et seq.*, and this Court's decision in *ICC* v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987).

The Hobbs Act provides for judicial review of ICC decisions. It states that any "party aggrieved by the final order [of the Commission] may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies." 28 U.S.C. 2344. The Commission's original action allowing Sierra to abandon its line was final on February 1, 1985. See Pet. App. 3a. But petitioners did not file a petition for review in the Ninth Circuit until September 2, 1987, well outside the 60-day period. Thus there can be no doubt that the court of appeals had no

jurisdiction to review the Commission's original exemption action.

Petitioners, however, did meet the Hobbs Act's 60-day limit for seeking review of the ICC's order of July 20, 1987, in which the Commission denied the request to reopen and reconsider its 1985 action. But this Court's opinion in *ICC* v. *Brotherhood of Locomotive Engineers*, *supra*, makes it clear that the appellate court did not have jurisdiction to review the ICC's decision not to reopen the question of Sierra's abandonment of its line. In *Locomotive Engineers*, the Court reviewed the relevant statutes, *e.g.*, 49 U.S.C. 10327(g), and held that a court of appeals has jurisdiction to review the denial of a petition to reopen an ICC proceeding only if "the petition that was denied sought reopening on the basis of new evidence or changed circumstances." 482 U.S. at 284. A petition to reopen on the ground that the ICC made a "material error" in its decision is not reviewable. *Id.* at 280.

Here, the court of appeals correctly ruled that petitioners did not seek to reopen the 1985 proceeding on the basis of new evidence or changed circumstances. Rather, petitioners simply maintained (and still do) that the Commission committed errors in 1985 when it authorized Sierra to abandonment its line.[10] In essence, petitioners contended that the Commission's exemption action was wrong at the time it was taken because the Commission failed to comply with the environmental-review requirements of NEPA and NHPA.[11] Accordingly, because the petition to reopen was not based on new evidence or changed circumstances—a

---

[10] Much of the petition in this Court (*e.g.*, Pet. 23-25) is an attempt to reiterate such claimed errors.

[11] Petitioners' contention (Pet. 23) that the Commission's action was "void *ab initio*" is just another way to say the Commission committed a material error when it took its action.

point that we do not understand petitioners to contest at this time—the court of appeals properly dismissed the petition for judicial review. Accord *Advance Transp. Co.* v. *United States*, 884 F.2d 303 (7th Cir. 1989).

2. Petitioners maintain (Pet. 13-17, 21-23) that they are not bound by the terms of the Hobbs Act and the *Locomotive Engineers* decision because the ICC's notice of its action in 1985 violated petitioners' constitutional right not to be deprived of property without due process. In other words, petitioners argue that the Due Process Clause requires the Hobbs Act to be construed to allow jurisdiction in this case. That argument is contrary to the decisions of this Court and many courts of appeals.[12]

In this case, the ICC gave notice of its intent to permit abandonment by publishing a notice of exemption in the *Federal Register*, 50 Fed. Reg. 188 (1985).[13] See Pet. App. 3a. At the same time, the ICC sent copies of the notice to the Governor of California and many California state agencies.[14] This Court's decision in *Lyng* v. *Payne*, 476

---

[12] Petitioners do not identify their "property rights" that are protected by the Due Process Clause. In fact, they may not have lost any such property right as a result of the ICC's action. See *Callaway* v. *Block*, 763 F.2d 1283, 1290 (8th Cir. 1985) (farmers did not have property interests in the government's peanut quotas). But as we explain in the text, even if petitioners were deprived of protected property rights, the Due Process Clause was satisfied by the ICC's notice in this case.

[13] The notice described the proposed action and invited interested parties to address environmental, energy, and public use concerns. Pet. App. 29a-30a.

[14] Petitioners claim (Pet. 6-8) that, in an earlier proceeding involving Sierra, an ICC staff member promised to advise locally interested parties of any actions affecting Sierra's lines. As the Commission explained, however, "[t]o charge the Commission with knowledge in each case involving a particular carrier with matters outside that case because they were before the agency at one time would be an unrealistic and impossible burden." Pet. App. 18a n.7.

U.S. 926 (1986), makes it clear that such notice was sufficient under the Due Process Clause. In that case, the Court considered a claim that the Farmers Home Administration failed to publicize adequately the availability of certain low-interest loans. The Court, after assuming that the plaintiffs had been deprived of a property interest, held that the "notice published in the Federal Register * * * was more than ample to satisfy any due process concerns." *Id.* at 942. Accord 44 U.S.C. 1507 (publication in Federal Register "is sufficient to give notice of the contents of the document to a person subject to or affected by it"); *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380, 384-385 (1947) (Wheat crop insurance regulations were binding after they were published in the *Federal Register* regardless of actual knowledge of the regulations).

Contrary to petitioners' suggestion (Pet. 16), no court of appeals has held that notice of administrative action in the Federal Register is inadequate to protect the rights of the general public.[15] In the two cases that petitioners cite, the courts held that a particular statute (not the Constitution) required more notice than publication in the *Federal Register*. See *Matzke* v. *Block*, 732 F.2d 799 (10th Cir. 1984) (relying on 7 U.S.C. 1981a); *Allison* v. *Block*, 723 F.2d 631 (8th Cir. 1983) (same). Indeed, every circuit that has considered the question of notice in administrative proceedings of the type at issue here has held that publication in the *Federal Register* satisfies the Due Process Clause. See, *e.g.*, *Bennett* v. *Director, Office of Workers' Compensation Programs*, 717 F.2d 1167, 1169-1170 (7th Cir. 1983); *North Alabama Express, Inc.* v. *United States*, 585 F.2d 783,

---

[15] In any event, the ICC in this case did more than publish its notice in the *Federal Register*. It sent copies to the entities most likely interested—the Governor of California and various state agencies, including the State Historic Preservation Office.

789-790 (5th Cir. 1978) (requiring Federal Register notice to be clear); *Bank of Commerce* v. *Board of Governors*, 513 F.2d 164, 166-167 (10th Cir. 1975); *Pearson* v. *Walling*, 138 F.2d 655, 660 (8th Cir.), cert. denied, 321 U.S. 775 (1943). Accordingly, the court of appeals correctly applied the terms of the Hobbs Act, as interpreted by this Court in *Locomotive Engineers*, and dismissed petitioners' case for lack of jurisdiction.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. BURK
General Counsel

ELLEN D. HANSON
Associate General Counsel

EVELYN G. KITAY
Attorney
Interstate Commerce Commission

JANUARY 1990

U.S. GOVERNMENT PRINTING OFFICE 1989—262-203/00720